IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID LANE JOHNSON,	:	Case No. 5:17-cv-00047-SL
Plaintiff,	:	Judge Sara Lioi
v.	:	
NFLPA, et al.,	:	
Defendants.	:	

Plaintiff David Lane Johnson's Supplemental Memorandum in Opposition to Defendant NFLPA's Motion to Transfer Venue

INTRODUCTION

Pursuant to the Court's March 10, 2017 Briefing Order (Doc. No. 51), Plaintiff David Lane Johnson supplements its opposition to Defendant NFLPA's Motion to Transfer Venue (Doc. No. 16), including its Supplemental Memorandum in Further Support of Its Motion to Transfer Venue (Doc. No. 47) ("Supplemental Memorandum"). Plaintiff's Supplemental Memorandum does not cite a single decision supporting its position that this Court should transfer this case for inconvenience. Rather, the NFLPA's untenable transfer request ignores its prior admissions and additional averments in Johnson's Amended Complaint (Doc. No. 39).

Johnson's Supplemental Memorandum focuses entirely on ¶ 16 of Johnson's Amended Complaint. Doc. No. 47 at 2048. In doing so, the NFLPA ignores Johnson's added averments that the NFLPA:

- [R]esides within and has continuous and systematic contacts with this District. Doc. No. 39 at 1726, ¶ 2;
- [H]as represented players with respect to discipline imposed under the 2015 Policy within this District. Doc. No. 39 at 1728, ¶ 11; and

- [T]ransacted business directly relating to Johnson's claims within this District. Doc. No. 39 at 1732, ¶ 18.

Furthermore, the NFLPA admitted it "regularly does business within this District." *See* Doc. No. 28 at 1023, ¶ 2; Doc. No. 1 at 2, ¶ 2.

Given the NFLPA's significant and admitted regular contact with this District, the NFLPA hardly can argue it is inconvenient for it to litigate here. However, a showing of inconvenience is exactly what a motion to transfer under 28 U.S.C. § 1404(a) requires.[1]

The NFLPA has filed three separate documents in support of its transfer request (Doc. Nos. 16, 37, and 47). The totality of the NFLPA's filings fails to meet the NFLPA's significant burden that the weight of the evidence ***strongly*** favors transfer. Rather, the 28 U.S.C. § 1404(a) factors weigh in favor of this Court retaining this case. *See* Doc. No. 29 at 1077 (chart weighing the § 1404(a) factors in favor of this District).

RELEVANT FACTS

This case stems from discipline Johnson received following an allegedly positive drug test in violation of the NFL Policy on Performance-Enhancing Substances (the "Policy"), including the gross misbehavior of Defendants and arbitrator James Carter, during Johnson's discipline appeal and hearings. The NFLPA would have this Court believe the entirety of this case began in July 2016 when Johnson provided the allegedly "positive" urine sample, for which the NFLMC suspended him for ten games. *See* Doc. No. 47 at 2048. However, that collection and subsequent drug test never would have occurred if Dr. John Lombardo, the Policy's Independent Administrator, did not place Johnson into the reasonable cause testing program from Ohio in 2014. Doc. No. 39 at 1730, ¶ 16(q).

[1] Section 1404(a) begins, "[f]or the convenience of the parties…"

Much of this case's foundation, including the alleged grounds for Johnson's July 2016 test and the basis for the 2016 discipline, occurred in Ohio. *See* Doc. No. 39 at 1728-1732, ¶ 16. The NFLPA improperly dismisses this foundation. The NFLPA also ignores key averments and the cause of action Johnson added to his Amended Complaint. The NFLPA further ignores its earlier admissions that events material to this case occurred (in Ohio).

I. THE NFLPA ADMITTED BUT NOW IGNORES MANY OHIO EVENTS

Johnson's Amended Complaint expressly identifies Ohio as the location of many of the material events forming the basis of his claims. *See*, e.g., Doc. No. 39 at 1728-1732, ¶ 16. In his original Complaint, Johnson included most of these same events, just without the Ohio identifier, which the NFLPA admitted. Specifically, the NFLPA admitted the following:

- [T]here was a communication between Lombardo and Johnson on May 19, 2014. Doc. No. 28 at 1028, ¶ 40.
- Lombardo communicated with Birch on July 1, 2014. Doc. No. 28 at 1028, ¶ 41.
- Johnson sent a letter on September 8, 2016 appealing his suspension. Doc. No. 28 at 1030, ¶ 54.
- [P]rior to the arbitration hearing, Johnson sought certain information. Doc. No. 28 at 1030, ¶ 55.
- [I]t received a copy of the September 16, 2016 discovery requests referenced in Paragraph 101. Doc. No. 28 at 1036, ¶ 101.
- [I]t communicated with Johnson on or about September 9, 2016. Doc. No. 28 at 1038, ¶ 123.
- [I]t received a communication from Johnson on September 12, 2016. Doc. No. 28 at 1039, ¶ 125.
- [I]t received a communication from Johnson on September 14, 2016. Doc. No. 28 at 1039, ¶ 126.
- [I]t communicated with Johnson on September 15, 2016. Doc. No. 28 at 1039, ¶ 127.

- [I]t received a communication from Johnson on September 16, 2016. Doc. No. 28 at 1039, ¶ 128.

- [I]t communicated with Johnson on September 19, 2016. Doc. No. 28 at 1039, ¶ 129.

- [I]t communicated with Johnson on September 19, 2016. Doc. No. 28 at 1040, ¶ 130.

- [I]t received a communication from Johnson on September 21, 2016. Doc. No. 28 at 1040, ¶ 131.

- To the extent Paragraph 132 purports to quote or describe documents, the NFLPA refers Plaintiff to those documents for a description of their contents. Doc. No. 28 at 1040, ¶ 132.

- [I]t received a communication from Johnson on September 25, 2016. Doc. No. 28 at 1040, ¶ 133.

- [I]t communicated with Johnson regarding the term "full season." Doc. No. 28 at 1040, ¶ 134.

- [I]t communicated with Johnson on September 30, 2016. Doc. No. 28 at 1040, ¶ 135.

- Johnson submitted discovery requests to the NFLMC on September 16, 2016. Doc. No. 28 at 1042, ¶ 149.

Exhibit 1 is a compilation of these NFLPA admitted communications, which occurred, in part, in Ohio.[2]

The NFLPA had no hesitation admitting the above events occurred. Only now, after filing a motion to transfer due to this forum's alleged inconvenience and a motion to dismiss, in part, for improper venue and lack of jurisdiction, does the NFLPA balk at these events occurring in Ohio.

If these material events did not occur in Ohio, where did they occur? The NFLPA offers no alternative to Ohio, because no alternative exists. Rather, the NFLPA admitted, "this

[2] Added to the bottom right corner of Exhibit 1 is the paragraph number from the NFLPA's Answer and Defenses to the Complaint (Doc. No. 28) to which the document corresponds. Yellow highlighting also was added for emphasis.

litigation concerns…the NFLPA's alleged failure to…provide documents to Johnson during the arbitration process (*i.e.*, the duty of fair representation and LMRDA claims)." Doc. No. 37 at 1688 (emphasis in original); *see also* Doc. No. 37 at 1693 (NFLPA admitted one of "the key 'facts' in this case…[is] what the NFLPA supposedly did not do to support Johnson's appeal"). Combining the numerous documents included in Exhibit 1 with the NFLPA's admissions it is clear the NFLPA's actions, which directly relate to Johnson's claims, occurred in Ohio.

II. THE NFLPA IGNORES SIGNIFICANT PORTIONS OF JOHNSON'S AMENDED COMPLAINT

The NFLPA does not address Johnson's new "Tenth Cause of Action – Breach of Duty of Fair Representation by the NFLPA". Johnson based this cause of action, in part, on representations the NFLPA made to this Court. *See* Doc. No. 39 at 1774-1776, ¶¶ 316-332.[3] Given that the NFLPA made these averments in this District, Johnson's Tenth Cause of Action relates directly to the NFLPA's conduct in this District. Yet, the NFLPA in its Supplemental Memorandum completely ignores this cause of action.[4]

While the NFLPA, in its Supplemental Memorandum, focuses on ¶ 16 of the Amended Complaint, it failed to address the following subparts to ¶ 16:[5]

- (h) The NFLMC and NFLPA's policies on performance-enhancing substances are at the core of this litigation and applied and enforced within this District;
- (ff) The NFLMC enforced the 2015 Policy and its predecessor policies on players within this District; and
- (gg) The NFLPA was required to represent its members' interests concerning the 2015 Policy and its predecessor policies within this District.

[3] While the Court struck the NFLPA's Memorandum in Opposition to Plaintiff's Motion to Vacate Arbitration Award (Doc. No. 33), *see* Doc. No. 51 at 2261, the NFLPA still made the representations included therein and Johnson's Amended Complaint, which references some of those representations, remains part of the record.
[4] The NFLPA filed its Supplemental Memorandum on March 1, 2017, which was well before the Court's March 10, 2017 Briefing Order.
[5] The NFLPA separates ¶ 16's subparts into three groups, but it does not include in any of the three groupings or otherwise address ¶ 16 subparts (h), (ff), and (gg). *See* Doc. No. 47 at 2048.

The NFLPA's claim that this District is inconvenient does not harmonize with the regularity with which Defendants apply the Policy within this District and the NFLPA's routine representation of its members within this District.[6]

III. JOHNSON'S DISCIPLINE HISTORY IS MATERIAL AND RELEVANT

Johnson's first exposure to the Policy's predecessor was at the 2013 Rookie Symposium in Aurora, Ohio. *See* Doc. No. 39 at 1728-1729, ¶ 16(a)-(g). Since 2013, Defendants have updated their performance-enhancing substances policy, but it was in Aurora, Ohio that Johnson received the only collective training from Defendants on any of their performance-enhancing substances policies. Doc. No. 39 at 1729, ¶ 16(d).

Aurora, Ohio is where Johnson learned the basic framework of the Policy under which the NFLMC disciplined him most recently, including the progressive and cumulative nature of the Policy's discipline structure. *See* Doc. No. 39-1 at 1793-1794. In 2014, the NFLMC suspended Johnson four games under the predecessor policy. *See* Doc. No. 39 at 1738, ¶¶ 42-44. Because of the 2014 four-game suspension, the NFLMC suspended Johnson ten games for his most recent alleged violation. *See* Doc. No. 39 at 1740, ¶ 56.

As part of Johnson's 2014 discipline, Lombardo communicated with Defendants and placed Johnson into the reasonable cause testing program from Ohio. Doc. No. 39 at 1730 (¶ 16(m)-(s)), 1738 (¶ 43). In fact, Lombardo ***administered the entirety of the program from Ohio*** until at least 2015. *See* Doc. No. 39 at 1729, ¶ 16(i)-(j). From Ohio, he created his testing database, which he uses to this day, through which he placed Johnson in reasonable cause testing in 2014, and through which he directed Johnson to submit to testing in July 2016. Doc. No. 39 at 1730, ¶ 16(n).

[6] With discovery, Johnson is confident he could uncover regular travel by the NFLPA to Ohio and this District.

The genesis of Johnson's ten game suspension (which is the core issue in this case and in the arbitration) occurred in Ohio where Lombardo placed Johnson into the reasonable cause program in 2014. Ignoring the critical events that occurred before Johnson's July 2016 drug test is tantamount to ignoring, in an excessive force case, the basic training a police officer receives regarding apprehending a suspected criminal or ignoring, in a wrongful discharge case stemming from a progressive discipline policy, the progressive discipline that led to the discharge.

LAW AND ARGUMENT

"For a proper transfer in the Sixth Circuit, the balance of ***all relevant factors must weigh 'strongly in favor of transfer***.'" *Jeffrey Mining Prods. v. Left Fork Mining Co.*, 35 F. Supp. 937, 938 (N.D. Ohio 1997) (citations omitted) (emphasis added); *see also O-Line Acad., LLC v. NBC Universal, Inc.*, No. 1:16 cv 90, 2016 U.S. Dist. LEXIS 68555, at *4 (N.D. Ohio May 25, 2016) ("party seeking transfer has the burden to prove that the balance of convenience is strongly in favor of transfer").[7] The NFLPA has not and cannot meet this significant burden.

I. THIS FORUM IS CONVENIENT

This forum is more convenient and less expensive for Johnson, as compared to the District Court for the Southern District of New York ("SDNY") or the District Court for the District of Columbia. *See* Doc. No. 29-2 at 1147, ¶ 2. Regardless of whether Johnson is a resident of this State, the Court should give his choice of this forum the same weight as the other § 1404(a) factors. *See Central States, Southeast & Southwest Areas Health & Welfare Fund v. Guarantee Trust Life Ins. Co.*, 8 F. Supp. 2d 1008, 1012 (N.D. Ohio 1998) ("the Court determines that Plaintiffs' choice of forum is given the ***same weight as the other factors*** necessary to a transfer analysis because it is not Plaintiffs' home forum…") (emphasis added).

[7] Unreported decisions cited herein are attached in alphabetical order as Exhibit 3.

The NFLPA's claim that this forum is inconvenient rings hollow, given its regular presence in this District. Doc. No. 28 at 1023, ¶ 2; Doc. No. 39 at 1726, ¶ 2. The NFLPA attempts to demonstrate the forum's inconvenience by falsely claiming that the Akron-Canton airport does not offer direct flights to and from Washington, D.C. *See* Doc. No. 37 at 1694. In support of this faulty position, the NFLPA misleads this Court by citing U.S. Department of Transportation statistics from November 1, 2015 to October 31, 2016 – a period ending months before Johnson filed his Complaint on January 6, 2017. *See* Doc. No. 37 at 1694, fn. 6. The NFLPA's obfuscation and misleading of this Court is emblematic of the NFLPA's unfair treatment of Johnson underlying the instant action, including the NFLPA's violation of its duty of fair representation and refusal to provide Johnson a complete copy of the Policy in violation of the Labor Management Reporting and Disclosure Act ("LMRDA").

A simple review of the Akron-Canton Airport website (http://www.akroncantonairport.com/airlines (last visited March 30, 2017)) demonstrates that "American Airlines offers nonstop/direct flights to New York City (LGA), Washington, D.C (DCA)." *See also* Exhibit 2 (printout from Akron-Canton Airport's website). There also are ample nonstop daily flights in and out of Cleveland Hopkins International Airport to and from Washington D.C. airports (http://www. clevelandairport.com/flight-information/non-stop-cities (last visited March 30, 2017).

That there are more travel options into and out of New York is insufficient to warrant transfer. Johnson was not required to select the forum most convenient for Defendants. *See Means v. United States Conf. of Catholic Bishops*, 836 F.3d 643, 651-652 (6th Cir. 2016) (a district court need not "transfer venue to the location most convenient to witnesses and where the primary events took place").

That the NFLPA regularly does business in this District and has a continuous presence here undermines the motive for its transfer request. Rather, it seems the NFLPA's request is less one of inconvenience to the NFLPA and more a continuation of its desire to improperly inconvenience Johnson, one of its members. *See Phelps v. U.S.*, No. 1:07CV02738, 2008 U.S. LEXIS 108000, at *6 (N.D. Ohio Feb. 19, 2008) (Lioi, J.) (transfer improper where it "would serve merely to shift the inconvenience from one party to another") (citations omitted); *see also Detrick v. 84 Lumber Co.*, No. 5:06CV2732, 2007 U.S. Dist. LEXIS 33154, at *6-7 (N.D. Ohio Apr. 24, 2007) (Lioi, J.) (same).

From the moment Johnson sought to challenge his discipline, the NFLPA has more closely aligned itself with the wishes and desires of the NFL and NFLMC -- a fact that is further demonstrated by the NFLPA's request to transfer this case to the SDNY, the preferred location of the NFL and the NFLMC and not where the NFLPA is located in Washington, D.C. That the NFLPA even challenges its member's desired forum, when it regularly does business in that forum, alone is telling of the NFLPA's allegiance.

Absent discovery, it is difficult to pinpoint the reasoning for the NFLPA's misconduct as to Johnson. It may be because Johnson made comments adverse to the NFLPA. Doc. No. 39 at 1749-1750, ¶¶ 123-126. It also may be because Johnson challenged the status quo, which was a corrupt Policy. Throughout his discipline appeal, Johnson also challenged the NFLPA's failure to (1) adequately represent its members' interests, (2) abide by the terms of the Policy, and (3) abide by the terms of the NFLPA's Constitution. Regardless of the NFLPA's specific reasoning, its alignment with the NFL and the NFLMC to protect the magnitude and secrecy of Defendants' corruption has become increasingly clear.

II. OPERATIVE EVENTS TOOK PLACE IN THIS DISTRCT

Bolstering Johnson's choice of this forum is that many of the operative events occurred here. This Court should give Johnson's choice of forum the same weight as the other factors even if the operative events did not take place here. *See Central States*, 8 F. Supp. 2d at 1012.

The NFLPA continues to tout arbitrator Carter's claimed New York location (Doc. No. 47 at 2047); however, there is no evidence in the record that Carter conducted the September 22, 2016 discovery hearing from New York. The NFLPA makes the leap from stating it "believes Arbitrator Carter conducted the discovery hearing from his New York office" (Doc. No. 37 at 1692) to "arbitrator Carter presided over the teleconference from New York" and "Arbitrator Carter was in New York" (Doc. No. 47 at 2050). Arbitrator Carter could have been anywhere during the discovery hearing. He could have been in Ohio. Yet, the NFLPA states unequivocally that he was in New York.

For as much as the NFLPA emphasizes the New York location of Carter, Defendants' cherry-picked arbitrator, it wishes to minimize Johnson's selection of Ohio counsel and the events that occurred in Ohio both before and subsequent to the arbitration. See the "Relevant Facts" section above. While Johnson's counsel is in Ohio, that is not the main reason Johnson filed this action here. (Distinguishing the decisions cited by the NFLPA -- *P.R. Chunk, Inc. v. Martin Marietta Materials, Inc.*, No. 3:01CV7643, 2002 U.S. Dist. LEXIS 7824, at *2-3 (N.D. March 8, 2002) ("the principal reason that this case is here is because plaintiffs' counsel…is in Ohio") and *Watson v. Bortz Health Care of Rose City*, No. 05-72989, 2006 U.S. Dist. LEXIS 4852 (E.D. Mich. Jan. 20, 2006), at *7-8 ("Plaintiff's only evident connection with the Southern Division is that it is the district in which Plaintiff's counsel is located")).

Johnson brought this action in this District for a host of reasons, the least of which are the many events, which the NFLPA admitted, that occurred in Ohio (i.e., communications with Johnson that form the basis of his unfair labor practice violation claims and LMRDA claim and support his grounds for vacating the erroneous arbitration award). *See* Exhibit 1. The NFLPA's false and misleading phone calls and emails into this District are at the heart of many of Johnson's claims. *See Neal v. Janssen*, 270 F.3d 328, 332 (6th Cir. 2001) ("acts of making phone calls and sending facsimiles into the forum, standing alone, may be sufficient to confer jurisdiction on the foreign defendant where the phone calls and faxes form the bases for the action"). "It is the quality of the contacts, not the quantity" that is pertinent. *Id*. Here, both the quantity of the NFLPA's contacts and the quality are significant. *See* Exhibit 1.

III. THE NFLPA CONTINUES TO IGNORE PRIVATE-INTEREST FACTORS

The NFLPA has not suggested any NFLPA witnesses would be unwilling to travel to this District, thus, failing to address two of the five § 1404(a) private-interest factors.[8] As such, these factors are of little, to no, relevance to the Court's analysis. *See In re Commercial Money Ctr.*, No. 1:02CV16000, 2011 U.S. Dist. LEXIS 64342, at *35 (N.D. Ohio June 17, 2011) (*citing Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006)) ("[t]he Sixth Circuit has held that little significance should be attached to the compulsory process factor where a movant fails to show unwillingness of the relevant witnesses to testify").

[8] The private-interest factors include: (1) ease of access to evidence; (2) ability to require unwilling witnesses to attend proceedings; (3) costs associated with requiring unwilling witnesses to attend proceedings; (4) ability to inspect premises; and (5) any other issues affecting the efficiency and expense of litigating a case. *Nationwide Mut. Fire Ins. Co. v. Barbour*, No. 5:15 cv 456, 2015 U.S. Dist. LEXIS 125844, at *3-4 (N.D. Ohio Sept. 21, 2015) (Lioi, J.) (*citing Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 537-538 (6th Cir. 2002)).

IV. THE NFLPA MISAPPLIES OR IGNORES PUBLIC-INTEREST FACTORS[9]

The NFLPA continues falsely to state in a conclusory fashion that New York law governs the Policy. Doc. No. 47 at 2047. The Policy does not include such a controlling law provision. *See* Doc. No. 39-1. As Johnson explained previously, the NFLPA's assertion that New York law controls is false. *See* Doc. No. 29 at 1075-1076. The NFLPA does not refute Johnson's explanation. Regardless, this Court is more than capable of applying New York law. *See O-Line Acad.*, 2016 U.S. Dist. LEXIS 68555 at *9 ("federal courts routinely apply the laws of other states in resolving disputes").

V. JOHNSON'S LMRDA CLAIM IS TIED TO OHIO

Johnson requested of the NFLPA modifications to the Policy, which the NFLPA refused to share in violation of the LMRDA. Doc. No. 39 at 1773, ¶¶ 307-308. Johnson's requests came from Ohio and the NFLPA's refusal likely came from Washington, D.C. Johnson's LMRDA claim has no tie to the SDNY.

CONCLUSION

Johnson filed his Amended Complaint, in part, to avoid any confusion by the NFLPA as to the events that transpired in Ohio. Yet, the NFLPA continues to sing the same song -- "this action…has nothing to do with Ohio other than the presence of Johnson's lawyers…" and that the operative policy is "governed by New York law". Doc. No. 47 at 2047. Given the NFLPA's prior admissions and misstatements, this song is woefully out of tune.

[9] The public-interest factors include: (1) administrative difficulties caused by congested court dockets; (2) seating jurors to hear a matter that has no connection to the community; (3) "the local interest of having localized controversies decided at home;" and (4) the interest of having cases tried before a court familiar with the governing law. *Nationwide Mut. Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 125844, at *4 (citations omitted).

For the reasons stated above and in Johnson's Memorandum in Opposition to Defendant NFLPA's Motion to Transfer Venue (Doc. No. 29), Johnson respectfully requests that this Court deny the NFLPA's Motion to Transfer Venue (Doc. No. 16).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 31, 2017 the foregoing was filed using the Court's CM/ECF system. All parties and counsel of record will receive notice and service of this document through the Court's CM/ECF electronic filing system.

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